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FEDERAL COMMUNICATIONS COMMISSION
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MM Docket No. 98-35

To: The Commission

COMMENTS OF COUNCIL TREE COMMUNICATIONS, LLC

Council Tree Communications, L.L.C. ("Council Tree"), offers these comments on the Commission's Notice of Inquiry ("NOI") in the above-captioned proceeding.

INTRODUCTION

1. Council Tree is a recently formed venture which is vitally interested in the Commission's telecommunications ownership rules. Council Tree was founded by Steve Hillard, formerly the principal executive officer of Cook Inlet Communications, which for several years was the largest minority owned television and radio broadcaster in the country. A primary goal of Council Tree is to develop business opportunities that responsibly enhance minority, female, and small business ownership participation in the communications industries. Council Tree is forming a consortium of Alaska Native Corporations, as well as other minority-interest business entities, to pursue this goal. It has financial support from affiliations with Toronto Dominion Capital and Madison Dearborn Partners. The company headquarters is in the emerging technology corridor between Boulder and Longmont, Colorado, and the scope of potential operations is nationwide.

2. The Commission has with this NOI started the process of reviewing all of the broadcast ownership rules to see if any should be repealed or modified in view of the

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effects of economic competition in the regulated industries.[1] As noted in the NOI, one of the Commission's key regulatory goals is the promotion of diversity of ownership and the opportunity for expression of diverse viewpoints. Council Tree believes that this is an appropriate time for the Commission to evaluate, in the light of changing legal standards, the interplay between the attribution and ownership rules and the advancement of telecommunications ownership by members of racial and ethnic minority groups and women.[2] Minorities and women and, increasingly, small businesses of any kind have historically been and are today woefully under-represented in ownership. Cultivating ownership by these entities can foster both source and viewpoint diversity, as well as enhance economic competition with more representative industry composition. As shown below, efforts to further such ownership with respect to television have, on the whole, not been very successful. But the Commission has the means to advance the public policy goal of encouraging diverse ownership while avoiding questionable classification of applicants and licensees.

3. The Commission has invited commenters to provide relevant information concerning changes in diversity of ownership in the telecommunications industry (NOI, ¶12). It has noted its statutory obligation under §309(j) of the Act and its historic commitment as a matter of policy to encouraging participation by minorities, women, and small businesses in the industry. The Commission has also asked for comment on the relationship between

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[1] Certain of the ownership rules are already under review in separate dockets.

[2] The principal suggestion herein, however, could be implemented independently of the biennial review process.

radio ownership limits and the opportunity for minority broadcast station ownership (NOI, ¶22).[3]

BACKGROUND

4. Television is Council Tree's first area of interest. Television is the preeminent electronic medium in the country and is likely to remain so for the foreseeable future. For much of the public, television is not only the dominant entertainment medium, but also the most important forum for viewpoints on public issues. Yet the participation of minority, female, and small business owners in this medium is remarkably low and declining. Several charts depicting the dramatic under-representation of minorities in televison ownership are appended to these comments. They show that members of minority groups, as defined by the Commission, make up 19.7% of the population and yet own only 3.2% of commercial television stations. The discrepancy in the case of commercial network affiliates is even more pronounced, at a mere 1.7% minority ownership. Moreover, minority ownership of commercial television stations in the top 15 markets (which include a collective 26.2% minority presence, comprising a large part of the country's minority population) is hardly measurable -- one station out of 235. With increasing ownership concentration, structural and economic barriers to entry, and the elimination of ownership diversity enhancement programs, the trend for every type of minority ownership is headed down.[4]

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[3] The Commission notes an NTIA report finding that the number of minority-owned commercial radio stations declined from 312 in 1995 to 284 in 1996/97.

[4] Council Tree submits that the numbers for women-owned broadcast licensees are even more dramatically disproportionate. For example, in the top ten markets, arguably only three stations out of 160 are women-owned (assuming that Cox Broadcasting and Post-Newsweek are so classified). This corresponds to a fraction of one percent (0.18%) of ownership, in contrast to a population base of 52%.

5. In short, at a time of increasing concentration of ownership, audience share, and market power there is an *accelerating decline in ownership diversity*. Fewer and fewer stations are owned by minorities, women, or small businesses. Thoughtful structuring and application of the Commission's ownership rules is the last significant opportunity to promote the value of diversity in the television industry. Council Tree submits that participation by minorities and women in this key industry will be a defining factor for their societal roles going into the next century. Minority ownership does in fact have a direct effect on programming content and commitment and on the community role of a station, as shown by these examples:

- Station WSMV-TV (NBC - Nashville) -- At a time of extreme financial stress for the industry and for this station, from 1991 to 1995, minority owners took the extraordinary step of funding programs such as the award-winning "4 The Family", a series that dealt in material part with minority aspects of family issues, and other specials that resulted in the station being recognized by the National Association of Television Program Executives as the Nation's Most Honored Television Station.

- Station WTNH-TV (ABC - New Haven) -- From 1991 to 1993, under even greater stress from debt, this licensee elected to fund production of numerous public interest programs, including the award-winning "Price of Prejudice" series.

- Station WPGC-FM (Washington, D.C.) -- During its ownership of the station, from 1988 to 1993, this minority licensee focused on an urban music format and achieved the #1 position in the market while creating a strong minority identity and a remarkable record of community involvement and public service to the minority community of the Capital.

There is concrete evidence that minority ownership leads to diversity in programming.

6. In *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses,* 12 FCC Rcd 16802 (1997), the Commission summarized a number of barriers facing minority and female owned businesses which wish to compete in telecommunications.[5] The predominant impediment to entry is, not surprisingly, limited access to capital. Other potential barriers are historical patterns of discrimination and exclusion from business ownership and lack of employment and management experience because of past discrimination. Finding that there is strong indication that minorities and women have experienced "tremendous obstacles" in participating in the telecommunications industry, the Commission has undertaken a comprehensive study to further examine the role of small businesses and businesses owned by minorities or women in the telecommunications industry and the impact of its policies on access to the industry for such businesses.

7. The Commission and other government agencies committed to fostering racial and ethnic diversity face increasing hurdles in crafting mechanisms which accomplish the goal of increased diversity in ownership. Court decisions such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) and the recent opinion in *Lutheran Church - Missouri Synod,* _ U.S. App. D.C. _, No. 97-1116 (D.C. Cir., Apr. 14, 1998) seem to require either proof positive of remediable past discrimination or else a color-blind approach to increasing diversity. That latter approach lies in the philosophy and legislative findings underlaying §309(j) of the Act, which established certain pro-diversity principles to be employed in

[5] The Commission has announced its intention to issue a more extensive report on women and minority issues, 12 FCC Rcd. at 213. Council Tree believes that such a report could help to form the basis for a post-*Adarand* finding which would justify the restoration of a reasonable race-conscious program to encourage minority ownership.

competitive bidding for licenses. Subsection (3)(B) of that provision specifies that one objective of the competitive bidding system is

> promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

8. The small business provision of §309(j) provides a race and gender neutral means of advancing ownership diversity which could profitably be imported into the revision of the television ownership rules.[6] In the wake of *Adarand*, the Commission modified the rules for broadcast PCS competitive bidding to eliminate race- and gender-based bidding classifications. *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136 (1995) and *Broadband PCS Competitive Bidding Report and Order*, 11 FCC Rcd 7824 (1996). In those decisions the Commission determined that it did not have before it a record sufficient to justify minority- and gender-based bidding credits under the "strict scrutiny" standard, but continued its "designated entity" ("DE") program with benefits based solely on economic size. In so altering the DE program, the Commission found that:

> ...many minority- and women-owned entities are small businesses and will therefore qualify for the same special provisions that would have applied to them under our previous rules. Thus, we believe that our amended rules will continue to fulfill our mandate under Station 309(j) to provide opportunities for minority- and women-owned businesses to become providers of spectrum-based services.

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[6] This policy might also be applied to other services. For example, the Commission could relax the CSMR spectrum ownership caps where small business ownership is involved.

Minority groups which can obtain financing are likely to fall within the "small business" classification and to be channeled into ownership. In the C-Block PCS auction, in the absence of race- and gender-based rules, 36% of the winning bidders were women- and minority-owned firms, *Broadband Competitive Bidding Report and Order*, 11 FCC Rcd at 7834. While results that dramatic cannot be anticipated in future proceedings, it is apparent that the DE program is the most reliable proxy currently available for achieving diversity.

COUNCIL TREE'S PROPOSED APPLICATION OF THE DE CONCEPT TO THE OWNERSHIP RULES

9. Council Tree suggests that the policy embodied in §309(j) be implemented to further small business and minority broadcast ownership by providing for new DE exceptions to broadcast ownership restrictions. Application of the race and gender neutral DE concept would provide an avenue for greater diversity and the possibility of enhancement of minority ownership in television, where it will have the most immediate impact. Small business is the best Designated Entity category to serve the interests of (i) promoting the values of small business entrepreneurism and job growth, (ii) localism and public responsiveness in television ownership, (iii) avoiding content homogeneity, and (iv) insuring race and gender neutral criteria. DE rules have already been adopted and refined in the PCS, LMDS, and generic auction regulations. If Section 309(j) values are not addressed now to provide relief under the television ownership rules, it will be virtually impossible for the Commission to meaningfully address this issue in the future. On the other hand, the results of awarding new benefits under liberalization of the television ownership rules conditioned on enhancement of ownership diversity will be swift and substantial. With proper safeguards that approach will result in sustained enhancement of ownership diversity in television.

10. Council Tree submits that exceptions to the television ownership rules should be conditioned on fulfillment of the Section 309(j) criteria and enhancement of small business ownership. "Small Business" should be defined for this purpose by the application of the following criteria:

1. Generic Auction Rules;
2. Incubator Test: No attributable interest in television ownership in the last eight years;
3. Assets Test:
   - Small business = not over $50 million
   - Very small business = not over $25 million

   (This test is designed to avoid the "Wall Street Specials" that dominated the LMDS auction); and
4. Income test:
   - Small business = not over $50 million annually
   - Very small business = not over $25 million annually
5. Meaningful Equity Requirement for Small Business = 40% equity ownership plus *de jure* and *de facto* control.

The interests of non-controlling investors in small and very small business entities would not be attributed to them.

11. An applicant which seeks the benefit of relaxed television ownership rules should be controlled by a DE which holds at least 40% of equity, to avoid special treatment for insubstantial DE ownership. The DE advantage should be limited to new entrants to the industry and should be ended for an entrant after a certain time. The incubator and graduation concepts will assure assistance to those who need it at the outset without perpetuating assistance to mature businesses. Successful implementation of this concept

will require rigorous enforcement and tough penalties to assure that sham applicants do not receive benefits.

SPECIFIC OWNERSHIP PROPOSALS

12. The national television audience reach cap, as mandated by statute, is 35% of television households. Council Tree suggests that the Commission adopt a policy which would permit additional ownership by those with interests at the cap, conditioned on DE control of the incremental stations. Those interests would not be deemed attributable and therefore would not contravene the statutory cap. For example, a licensee with DE participation and small business status would be allowed to acquire an interest which would result in total interests in stations serving up to 45% of television households, 10% more than permitted under the statutory cap, so long as the incremental interests were non-attributable because they were in DE controlled licensees. A licensee with DE participation and very small business status might be allowed an interest which would bring the overall interest of its owners up by 20%, to 55% of television households, so long as the incremental interests over the statutory cap of 35% were in DE-controlled licensees. This program would promote the entry of smaller businesses into television ownership through partnering with existing entities. The policy would be similar to the former provision for expansion of the now-abandoned radio ownership caps where minority ownership was involved. Council Tree is convinced, based on the experience in other areas and that of its founding principal, that such a system will work effectively for television. In view of the intense Congressional interest which has been expressed in effective implementation of Section 309(j) and its underlying policies, Council Tree believes that ready Congressional backing exists for such a program.

13. Similarly, in the separate duopoly proceeding the Commission could structure the rules to permit duopolies in a manner which would encourage small business ownership. In the process members of minority groups and women would have an opportunity to enter broadcast ownership in meaningful numbers. For example, the Commission could permit a UHF/UHF duopoly for a small business entity in DMA markets 1 to 60. Very small business entities could have a UHF/UHF, VHF/UHF, or VHF/VHF duopoly in those markets.

14. The Commission should take advantage of this proceeding to implement rules which will facilitate the entry of Designated Entities to broadcast ownership in general and television ownership in particular. Such rules would, as a salutary indirect benefit, likely provide one part of the solution to a shockingly low minority and female presence in the broadcast ownership ranks.

Respectfully submitted,

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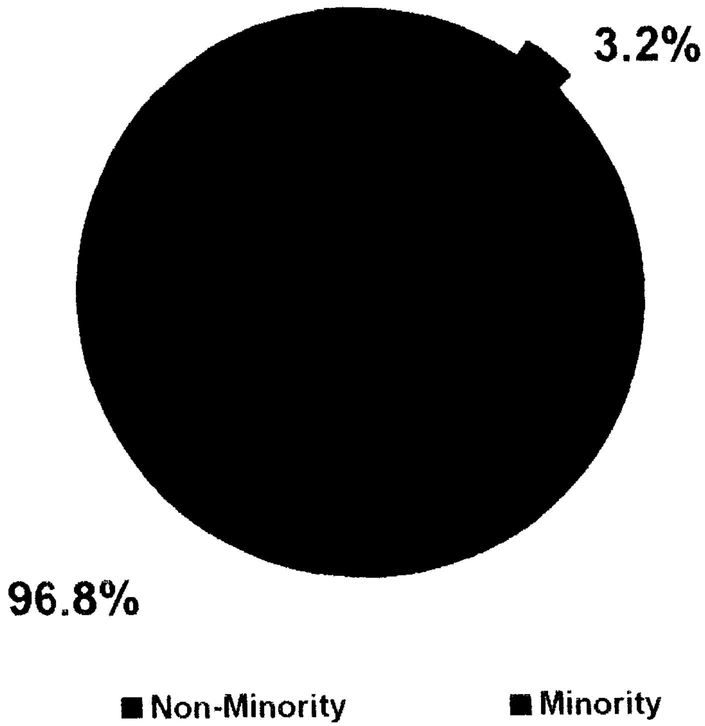
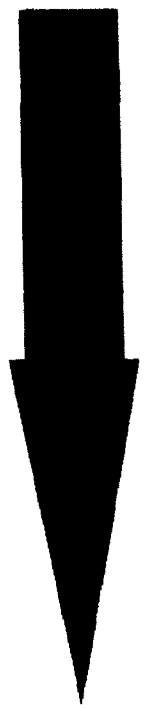
Minority-Owned Commercial TV Stations



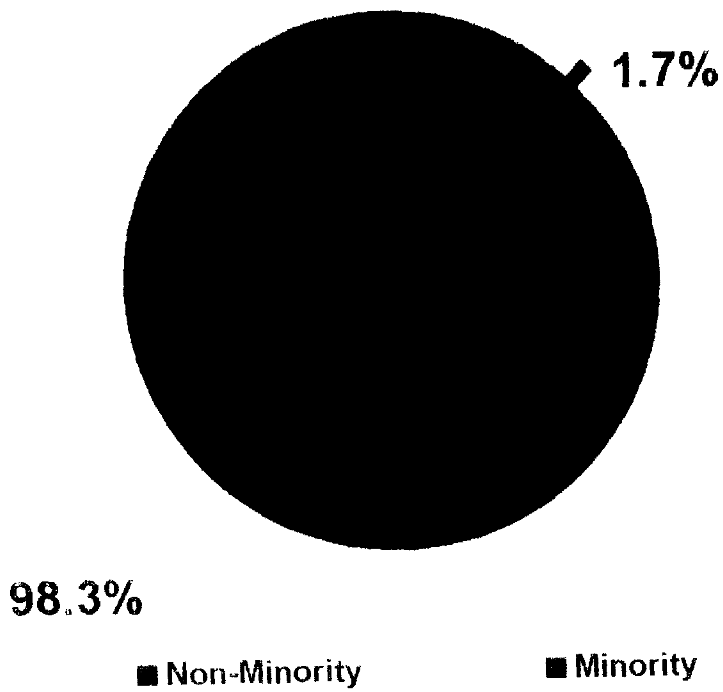
Trend



- Dramatic Underrepresentation of Minorities (3.2% vs 19.7% of Population)
- Overall Broadcasting Shows More Dramatic Decline (Dropped by 1/10 to 2.8% in 1997)
- Increasing Barriers To Entry
- Elimination of Diversity Enhancement Programs
- Concentration of Licenses
- Escalation of Station Prices

Sources: National Telecommunications & Information Administration (1997), NAB Market to Market (1997), Broadcasting & Cable Yearbook (1997)

Minority-Owned TV Network Affiliates

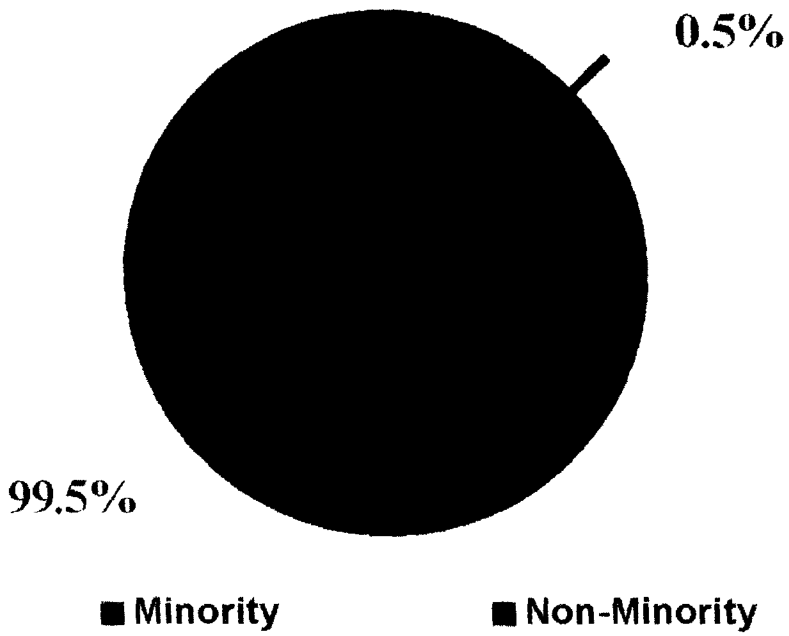


Trend

- Dramatic Underrepresentation of Minorities (1.7% vs 19.7% of Population)
- Networks = 70%-plus of National Audience Share
- Includes all Networks: NBS, ABC CBS, Fox, UPN, WB
- Consolidation of Network Ownership and Affiliate Groups
- Barriers to Capital Access
- Marginal Efforts by Networks an Affiliate Groups to Increase Minority Ownership

Sources: National Telecommunications & Information Administration (1997), NAB Market to Market (1997), Broadcasting & Cable Yearbook (1997)

Minority-Owned Commercial TV Stations In Top 15 Markets

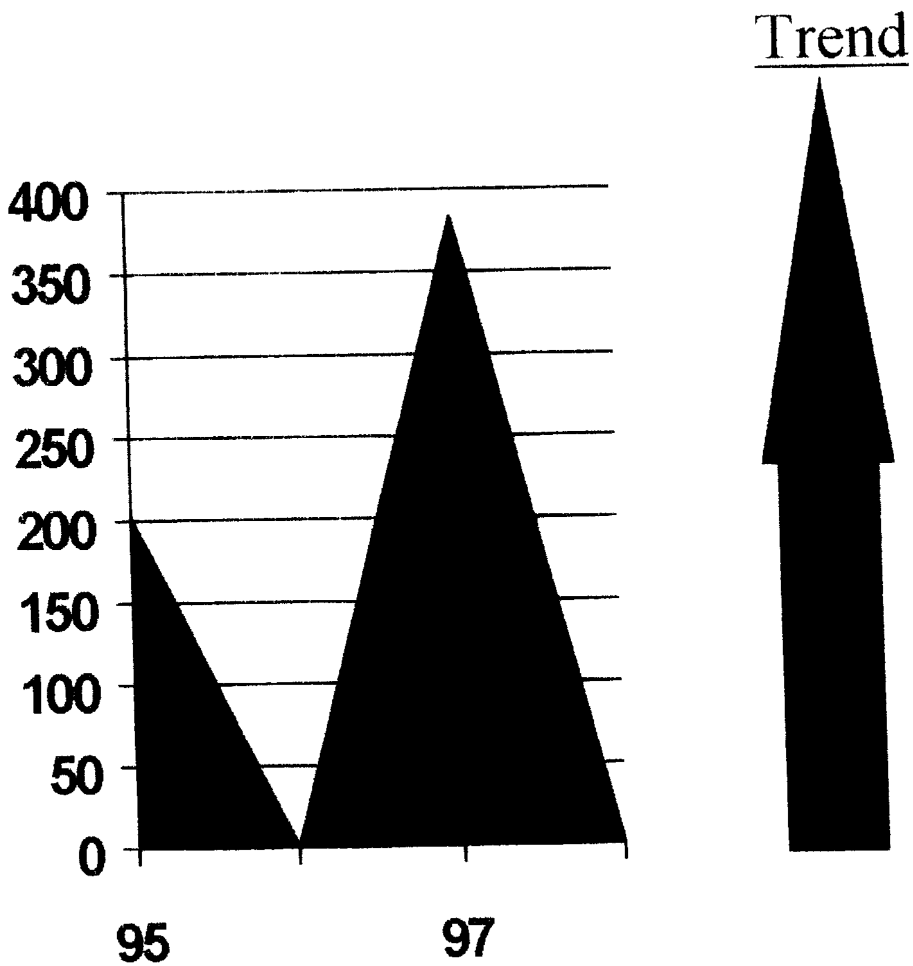


Trend

- 1 Station Out of 235 Licenses.
- Versus 26.2% Minority Population in the Top 15 Markets.
- Bottom Line: No Meaningful Minority Representation in U.S. Major Markets.

Sources: National Telecommunications & Information Administration (1997), NAB Market to Market (1997), Broadcasting & Cable Yearbook (1997)

TV Industry Concentration



- Increasing Concentration of License Ownership, Audience Share and Market Power
- Accelerating Decline in Diversity -- Fewer Small Businessess, Minority and Women-Owned Stations
- FCC Ownership Rules as Last Significant Opportunity to Promote Diversity Values in TV

- Top 25 TV Groups Grew From 202 Stations (16.55% of Nation) in 1995 to 383 Stations (32.11% of Nation) in 19
- Sources: National Telecommunications & Information Administration (1997), NAB Market to Market (1997), Broadcasting & Cable Yearbook (1997)